

MAR 5 1984

No. 83-1056**In the Supreme Court of the United States**

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF
EQUALIZATION, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari
To the Supreme Court of Oklahoma**

**BRIEF OF THE OKLAHOMA COUNTY BOARD OF
EQUALIZATION, et al., IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

ROBERT H. MACY
District Attorney of
Oklahoma County, Oklahoma

FRANK E. WALTA*
Assistant District Attorney

KEVIN C. LEITCH
Assistant District Attorney

202 Robert S. Kerr Avenue
Oklahoma City, Okla. 73102
Tel. (405) 235-5522

Attorneys for Respondent

March, 1984

*Counsel of Record

QUESTION PRESENTED

Whether Petitioner may invoke the jurisdiction of this Court alleging impairment of contract in derogation of the Contract, Due Process and Taking Clauses of the Federal Constitution where:

1. Petitioner has wholly failed to show the existence of a contract and in the face of a record which reflects that no contract was ever made;
2. The courts below did not decide Petitioner's claim of impairment; and
3. Petitioner's alleged contractual tax exemption is void *ab initio* under the constitution of the State of Oklahoma.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	15
ARGUMENT:	
I. No Federal Question Is Presented for This Court to Review Because No Contract Ever Existed Be- tween the Parties and Therefore the Case Does Not Involve the Contract Clause	15
A. No contract exists <i>de jure</i>	16
1. Parties are incapable of contracting	16
2. Parties did not consent	17
3. The purported agreement did not have a lawful object	17
B. No contract exists <i>de facto</i> because no con- sent was ever given to an exemption	19
II. The Alleged Contract Was Not Impaired by Leg- islative Action Within the Meaning of the Fed- eral Constitution	21
III. This Court Lacks Jurisdiction to Hear Peti- tioner's Arguments Based on the Contract, Due Process and Taking Clauses of the Federal Con- stitution	23
A. Contract Clause — opinion by state court	25

TABLE OF CONTENTS CONTINUED

PAGE(S)

B. Due Process, Taking Clauses — opinion by state court	25
IV. Judicial Retroactivity Is Not a Valid Issue in This Case	26
CONCLUSION	29

APPENDIX A — Warranty Deed

APPENDIX B — Memorandum of Meeting 10-5-76

APPENDIX C — Attorney General Opinion No. 69-156

APPENDIX D — “Absolute Grant of Exclusive Right to Use”

APPENDIX E — “Lease”

APPENDIX F — Attorney General Opinion No. 79-168

TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Appleby v. City of New York,</i> 271 U.S. 364 (1926) -----	16
<i>Asson v. City of Burley,</i> 670 P.2d 839 (Idaho 1983) -----	17
<i>Atlantic Coast Line R. v. Phillips,</i> 332 U.S. 168 (1947) -----	20
<i>Baldwin v. Kansas,</i> 129 U.S. 52 (1889) -----	24
<i>Barrows v. Jackson,</i> 364 U.S. 249 (1953) -----	22
<i>Bonney v. City of Britton,</i> 214 P.2d 249 (Okla. 1950) -----	22
<i>Boone v. Porter,</i> 146 P. 584 (Okla. 1915) -----	28
<i>Bowls v. Oklahoma City,</i> 104 P. 902 (Okla. 1909) -----	28
<i>Chemical Bank v. Wash. Public Power Supply System,</i> 666 P.2d 329 (Wash. 1983) -----	16
<i>City of New Orleans v. New Orleans Water Works Co.,</i> 142 U.S. 79 (1891) -----	18
<i>County Assessor v. Carpenter and Joiners, Local 329,</i> 211 P.2d 790 (Okla. 1949) -----	18
<i>Dewey v. City of Des Moines,</i> 173 U.S. 193 (1899) -----	26
<i>Equitable Royalty Corp. v. State,</i> 352 P.2d 365 (Okla. 1960) -----	28
<i>Federal Crop Insur. Corp. v. Merrill,</i> 332 U.S. 380 (1947) -----	22
<i>F. G. Oxley Stove Co. v. Butler Co.,</i> 166 U.S. 648 (1897) -----	24
<i>General Motors Corp. v. Washington,</i> 377 U.S. 436 (1964) -----	15

AUTHORITIES CONTINUED	PAGE.
<i>Grand River Dam Auth. v. State,</i> 645 P.2d 1011 (Okla. 1982)	21
<i>Great No. Ry. v. Sunburst Oil & Ref. Co.,</i> 287 U.S. 358 (1932)	26
<i>Harris v. State,</i> 251 P.2d 700 (Okla. 1952)	22
<i>Illinois v. Gates,</i> U.S. ..., 103 S.Ct. 2317 (1983)	24, 26
<i>James v. State,</i> 15 P.2d 591 (Okla. 1932)	22
<i>John P. King Mfg. Co. v. City Council,</i> 277 U.S. 100 (1928)	22
<i>J. W. Perry Co. v. Norfolk,</i> 220 U.S. 472 (1911)	20
<i>Keefe v. Clark,</i> 322 U.S. 393 (1944)	20
<i>Lake Superior Consol. Iron Mines v. Lord,</i> 271 U.S. 577 (1926)	19
<i>Lemon v. Kurtzman,</i> 411 U.S. 192 (1973)	26
<i>Magnolia Petrol. Co. v. State,</i> 322 P.2d 188 (Okla. 1957)	28
<i>Mississippi & Mo. R. R. v. McClure,</i> 77 U.S. 511 (1871)	19
<i>Morris v. Bd. of Comm'rs,</i> 177 P. 900 (Okla. 1917)	28
<i>Mountain St. Tel. & Tel. Co. v. Ogden City,</i> 487 P.2d 849 (Utah 1971)	17
<i>Oklahoma City v. Shields,</i> 100 P. 559 (1908)	20
<i>Owens v. Sun Oil Co.,</i> 482 F.2d 564 (10th Cir. 1973)	15
<i>Perry Educ. Assn. v. Perry Local Educ. Assn.,</i> U.S. ..., 103 S.Ct. 948 (1983)	23
<i>Rose v. Stalcup,</i> 190 P. 396 (Okla. 1920)	28

AUTHORITIES CONTINUED	PAGE(S)
<i>Sayward v. Denny,</i> 158 U.S. 180 (1895)	24
<i>Sears v. Fair,</i> 397 P.2d 134 (Okla. 1964)	28
<i>State v. Brand,</i> 303 U.S. 95 (1938)	16
<i>State v. Ford,</i> 434 P.2d 934 (Okla. 1976)	27
<i>State ex rel. Comm'r's of Land Office v. Shull,</i> 279 P.2d 339 (Okla. 1955)	22
<i>State ex rel. Cartwright v. Dunbar,</i> 618 P.2d 900 (Okla. 1980)	9, 10, 12, 13, 14, 29
<i>State ex rel. Poulos v. St. Bd. of Equal.,</i> 552 P.2d 1134 (Okla. 1975)	28
<i>Stevens v. Patten,</i> 50 P.2d 1106 (Okla. 1935)	28
<i>Tidal Oil Co. v. Flanagan,</i> 263 U.S. 444 (1924)	22
<i>United States v. Stewart,</i> 311 U.S. 60 (1940)	22
<i>Utah v. United States,</i> 284 U.S. 534 (1932)	22
<i>Utah Power & Light Co. v. United States,</i> 243 U.S. 389 (1917)	22
<i>Williams v. Bruffy,</i> 96 U.S. 176 (1880)	22
Constitutional Provisions and Statutes	
U.S. CONST. art. I, §10, cl. 1	passim
U.S. CONST. amend V	passim
U.S. CONST. amend. XIV, §1	passim
28 U.S.C. §1257	23, 24
OKLA. CONST. art. 4, §1	21
OKLA. CONST. art. 5, §1	21
OKLA. CONST. art. 5, §50	18, 26
OKLA. CONST. art. 5, §51	27
OKLA. CONST. art. 6, §1	21

AUTHORITIES CONTINUED	PAGE(S)
OKLA. CONST. art. 10, §5	13, 17, 26
OKLA. CONST. art. 10, §8	26
OKLA. CONST art. 10, §9	6, 16
OKLA. CONST. art. 10, §15	27
OKLA. STAT. tit. 15, §2 (1981)	16
OKLA. STAT. tit. 15, §211 (1981)	17
OKLA. STAT. tit. 68, §2404 (1981)	27
OKLA. STAT. tit. 68, §2419 (1981)	4, 27
OKLA. STAT. tit. 74, §18b(e) (1981)	21
 Miscellaneous	
OKLA. ATTY. GEN. OPIN. 69-156	4, 9, 21
OKLA. ATTY. GEN. OPIN. 74-229	28
OKLA. ATTY. GEN. OPIN. 79-168	9, 10, 11, 12, 13, 21

No. 83-1056

In the
Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF
EQUALIZATION, *et al.,*
Respondents.

**BRIEF OF THE OKLAHOMA COUNTY BOARD OF
EQUALIZATION, *et al.,* IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

The power of taxation shall never be surrendered, suspended, or contracted away . . .

OKLA. CONST. art. 10, §5.

The legislature shall pass no law exempting any property in this state from taxation, except as otherwise provided in this Constitution. . . .

OKLA. CONST. art. 5, §50.

The legislature shall pass no law granting to any . . . corporation . . . any exclusive rights, privileges, or immunities within this State.

OKLA. CONST. art. 5, §51.

[N]or shall the State . . . make donation . . . by tax, or otherwise, to any company, association, or corporation.

OKLA. CONST. art. 10, §15.

All property which may be taxed ad valorem shall be assessed for taxation. . . .

OKLA. CONST. art. 10, §8.

No ad valorem tax shall be levied for state purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes. . . .

OKLA. CONST. art. 10, §9.

The powers of the government of the State of Oklahoma shall be divided into three separate departments: the Legislative, Executive and Judicial . . . and neither shall exercise the powers properly belonging to either of the others.

OKLA. CONST. art. 4, §1.

The legislative authority of the State shall be vested in a Legislature. . . .

OKLA. CONST. art. 5, §1.

The executive authority of the state shall be vested in a . . . Attorney General. . . .

OKLA. CONST. art. 6, §1.

All property of . . . this state and of the counties and of municipalities . . . shall be exempt from taxation.

OKLA. CONST. art. 10, §6.

All property in this state, whether real or personal, except that which is specifically exempt by law . . . shall be subject to ad valorem taxation.

OKLA. STAT. tit. 68, §2404 (1981).

Real property, for the purpose of ad valorem taxation, shall be construed to mean the land itself . . . and all buildings, structures and improvements. . . .

OKLA. STAT. tit. 68, §2419 (1981)

The duties of the Attorney General as Chief Law Officer of the State shall be:

* * *

(e) To give his opinion in writing upon all questions of law submitted to him by the Legislature, or either branch thereof, or by any state officer, board, commission or department, provided, that the Attorney General shall not furnish opinions to any but district attorneys, the Legislature or either branch thereof, or any other state official, board, commissioner or department, and to them only upon matters in which they are officially interested.

OKLA. STAT. tit. 74, §18b(e) (1981).

STATEMENT OF THE CASE

Respondent takes issue with Petitioner's statement of the case and offers the following chronology. In 1973 the Petitioner, General Motors Corporation, acquired actual record legal title, by Warranty Deed, to certain property located in Oklahoma City for the express purpose of constructing an automobile assembly plant thereon (R. 96, Appendix A). Shortly thereafter Petitioner commenced construction of the facility which construction was thereafter temporarily suspended.

On October 4, 1976, more than three (3) years after acquiring the property at issue and commencing construction of its automobile facility, the one and only meeting between officials of Petitioner and officials of the State of Oklahoma regarding taxes was held. At that meeting Philip Hoffman, the Manager of Property Taxes for Petitioner, met informally with several non-governmental representatives of the local Chamber of Commerce, a member of the Governor's staff, two members of the Tax Commission, the Attorney General, and the attorney for the Oklahoma Industries Authority (OIA), a public trust authority.

A memorandum of the meeting (Appendix B) prepared by a representative of the Chamber of Commerce, reflects that only a limited portion of the meeting related to ad valorem taxation. Specifically, mention was made of Attorney General's Opinion #69-156 (Appendix C) which concluded that leasehold interests in property which is owned by a public trust authority are not subject to ad valorem taxes.

The memorandum further reflects that all individuals present were aware that Petitioner, rather than the trust authority, owned the property on which the Petitioner's plant is located and, therefore, the conclusion enunciated by Attorney General Opinion #69-156 was inapplicable to Petitioner (R. 800, Deposition Hoffman pp. 41, 103-104). As a result of this obvious distinction the question arose as to whether land and buildings were separately taxable:

"The Attorney General further stated that he would make every effort to secure an answer related to separate ad valorem taxation of buildings and land." (Appendix B paragraph 3)

Despite recognition of this material factual distinction between the assumed facts of Attorney General Opinion #69-156 and the actual facts present in the Petitioner's circumstances, neither the Attorney General nor Petitioner pursued an answer to this critical question.

"Q. It indicates in paragraph three that Mr. Derryberry assured you that he would make every effort to secure an answer related to separate ad valorem taxation of buildings and land.

Did you ever receive such a specific answer?

A. That had regard to the technical problem of G.M. regarding owning the land. And did I receive a specific answer from Mr. Derryberry?

No.

Q. Did General Motors do any research in this area in reference to the problem of separate ad valorem taxation of buildings and land in Oklahoma City?

A. I don't recall."

(R. 800, Deposition Hoffman, pp. 48-49)

Had either the Attorney General or Petitioner pursued the question raised in the only meeting related to the Petitioner's facility, they would have readily discovered that under Oklahoma law, land, and buildings erected thereon, are not separately taxable for ad valorem purposes. OKLA. STAT. tit. 68, 2419.

At the meeting it was made clear to the representative of Petitioner that the State of Oklahoma did not levy ad valorem taxes, that ad valorem taxes were purely local taxes and that any claim to a legitimate exemption would have to be presented to and determined by the County Assessor (R. 805, Deposition Merrill, Chairman of the Oklahoma Tax Commission).

"Now, of course, as to the ad valorem tax exemptions, I am quite sure that I made it clear to Mr. Hoffman . . . that the state does not levy an ad valorem tax . . . that he would have to deal with the County Assessor and lay claim to his exemptions and point to the law which specifically provided that exemption and convince the County Assessor that it was, in fact, exempt from ad valorem taxes . . ." (Deposition Merrill, pp. 17-18).

"... the state does not have an ad valorem tax, it's purely a local jurisdiction tax, county, school, city, and that the administration of that is in the hands of the County Assessor . . . it would be the County Assessor determination whether, in fact, land was taxable within their county . . . that is left to his discretion to deal with the taxpayer on whether a legitimate exemption exists or not with respect to that taxpayer's property." (Deposition Merrill, pp. 50-53)

Commissioner Merrill's assertion to the representative of Petitioner was in strict conformity with an express provision of the Oklahoma Constitution.

"No ad valorem tax shall be levied for state purpose, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes . . ." OKLA. CONST. art. 10, §9.

The record reflects that not one of the Respondents, all of whom are taxing officials of the county, were present at the informal gathering on October 4, 1976. No representatives of the governmental body responsible for assessment, collection and administration of ad valorem taxes were present at the meeting.

Petitioner admits that *none* of the Respondents, neither the Oklahoma County Assessor, Treasurer nor representative of the County Board of Equalization, ever made any representation to Petitioner as to the availability of ad valorem exemptions on the Petitioner's project (R. 472).

Furthermore, Commissioner Merrill testified that *no* state official present at the meeting promised Petitioner ad valorem exemptions, nor were the officials at the meeting in any position to make a "deal or agreement" with regard

to ad valorem taxation (R. 805, Deposition Merrill, pp. 35, 57). Commissioner Merrill's recollection of the meeting is substantiated by the admission of Petitioner that neither the Governor, the Attorney General, nor any tax official of the State of Oklahoma, ever executed any agreement with Petitioner that the Petitioner's facility would not be subject to ad valorem tax (R. 473-474).

On April 12, 1978, after owning the property five (5) years, Petitioner executed and filed of record a document entitled "Absolute Grant of Exclusive Right to Use" (Appendix D) whereby Petitioner purported to grant to the Oklahoma Industries Authority (OIA) the right to use the surface of the Petitioner's property for a period of twenty years and one day.

"... whereas General Motors Corporation . . . is the owner of certain realty in Oklahoma County, State of Oklahoma . . . General Motors herewith gives and grants an exclusive right to use all of the herein described realty to OIA retaining . . . the parties recognize that bare legal title of surface and minerals will remain in General Motors and will be subject to ad valorem taxation as now and hereafter existing under the laws of the State of Oklahoma." (Appendix D)

Simultaneously, on April 12, 1978, the OIA executed a document labeled "Lease" (Appendix E) whereby the OIA leased back to Petitioner its "right to use" the surface of the Petitioner's property for a like term:

"... OIA has demised and leased, and by there presence does demise and lease . . . unto G.M. all of OIA's interest in that certain tract and parcel of land situated in Oklahoma County, State of Oklahoma . . . which is an estate owned by OIA . . . in accordance

with an Absolute Grant of Exclusive Right to Use from G.M. to OIA of even date herewith . . ." (Appendix E)

This purported "lease" is the only executed document offered by Petitioner to support the existence of its alleged "contract of exemption" from ad valorem taxation. However, this instrument, by its own terms, negates Petitioner's contentions specifically contemplating and making express provision for the payment of ad valorem taxes by Petitioner:

"Section 13

- (a) G.M. shall pay all special assessments levied against the project, and all personal property taxes assessed . . .
- (b) In the event the State of Oklahoma, or any political subdivision thereof, shall demand of OIA or G.M. the payment of any general or ad valorem tax of the property . . .
- (c) G.M. may, at its own expense and in its own name . . . contest any such assessment . . . Should any such tax or assessment be determined by the Court of final jurisdiction to which the question may have been appealed to be due and owing then the same shall be paid by G.M.
- (d) . . . G.M. will pay any and all ad valorem taxes assessed against the surface ownership of the Exhibit A realty . . ." (Appendix E)

In the proceedings below, Petitioner admitted that it had agreed to pay all property taxes imposed on the project (R. 457).

On July 31, 1979, pursuant to proper request and in accordance with state law, a new Attorney General issued Opinion #79-168, a 22-page opinion which, relying on Oklahoma Constitutional provisions, statutory and case law, concluded leasehold interests in properties owned by public trusts are taxable. This opinion withdrew opinion #69-156 which relied on one 1906 West Virginia case.

Petitioner claims that Attorney General Opinion #79-168 is a "legislative act" that impaired their alleged contract of exemption. Respondents assert that neither opinion was a "legislative act" and neither was applicable to Petitioner in any event, since the opinions dealt with properties title to which is held by public trusts, and in the instant case Petitioner is the record title owner of the property at issue.

In the proceedings below Petitioner admitted that it represents itself to be and treats itself as the owner of the land and buildings for financial reporting and state and federal income tax purposes (R. 459). Further, Petitioner admitted that it claims investment tax credits, interest and depreciation deductions on the building as if the owner for state and federal tax returns (R. 193).

Petitioner participated as amicus curiae in *State ex rel. Cartwright, et al., v. Dunbar, et al.*, 618 P.2d 900 (Okla. 1980), wherein the Attorney General brought an action to compel the County Assessor to place the property of two purported "lessees" of a public trust on the ad valorem tax rolls. In that proceeding, the alleged "lessees" claimed that the properties were owned by a public trust and, therefore, exempt from ad valorem taxation. Further, the "lessees" sought to challenge Attorney General Opinion #79-168 to the extent

it held leasehold interests in properties owned by public trusts to be taxable.

The Attorney General argued that the alleged "leases" were a sham and that the "lessees" were taxable because they owned the property and since there was no valid "leasehold", Attorney General Opinion #79-168 was neither applicable nor properly in issue.

On January 29, 1980, the Supreme Court of Oklahoma held in *Dunbar* as follows:

"Article X, Section 6 of the Oklahoma Constitution provides that ' . . . all property of . . . this state, and of the counties and of the municipalities . . . shall be exempt from taxation . . .' "

* * *

The critical issue is the meaning of the term 'property of this state, and of counties and of municipalities . . .'

* * *

. . . the determinative factor is 'ownership'. Therefore, we must determine the quantum of interest which 'lessees' have in the properties. If their interest is sufficient to constitute 'ownership' such property is not tax exempt . . .

* * *

The 'Lease Agreements' reveal numerous obligations and rights of the 'lessees' which are not ordinarily incidents of a leasehold estate . . . the substance of a transaction and not the name the parties have given it should determine the taxable status of property . . .

* * *

We conclude that . . . Lessees . . . are the 'owners' even though legal title to the properties is in . . . a public trust.

* * *

It is contended that the imposition of any tax upon public trust property would be an impairment of contractual obligations . . . The primary principle upon which it is contended that public trust property is not taxable is that it is constitutionally exempt from taxation because a tax-exempt entity . . . 'owns' such property. The failure of the taxing authorities to place public trust property on the tax rolls has not been due to some legislative enactment specifying that such property was not taxable, neither do petitioners attempt to tax such property because of a legislative change . . .

Therefore, no legislative enactment has impaired a contractual obligation.

* * *

... in holding that such property is taxable, we have not overruled any previous decisions nor is our decision in conflict with any decision . . .

* * *

We hold that the imposition of a tax upon the property in question would not violate the constitutional prohibition against impairment of contractual obligations . . ."

In January, 1980, the Respondent County Assessor assessed Petitioner on the land and buildings which constitute the Oklahoma City project for 1980. Petitioner protested the assessment to the Respondent Oklahoma County Board of Equalization which upheld the assessment on September 17, 1980. On September 25, 1980, Petitioner appealed the assessment to the District Court of Oklahoma County that "enforcement of Attorney General Opinion #79-168" would constitute an impairment of contract and deprive Petitioner of due process of law (R. 5).

In the court below, Petitioner readily conceded that it owns the property sought to be taxed ad valorem and that the property is taxable under *Dunbar*, but for the alleged contract of exemption.

" . . . General Motors did not contend in the District Court and does not contend here that the State of Oklahoma is the owner of the General Motors plant . . . It is uncontested also that such an ownership interest would be taxable under *Dunbar*, but for the tax abatement agreement." (Brief of Appellant G.M., p. 28; emphasis by G.M.)

In conceding its property to be taxable under *Dunbar*, *supra*, Petitioner conceded Attorney General Opinion #79-168 was inapplicable to the facts presented below and thus had no effect on any alleged contract:

"We should first classify the issues . . . The legal theory upon which the Attorney General based his July 31 opinion 79-168 is not the primary basis upon which petitioners predicate their entitlement to the writ sought in this action. A fair reading of the July 31 opinion discloses that it is based upon the conclusion that the leasehold interest of a private lessee in public trust property is taxable . . . In this action, petitioners rely primarily upon the doctrine of 'equitable ownership' . . . We are concerned here with only the legal issues presented on this record, not with abstract questions of law concerning the correctness of the July 31 opinion of the Attorney General. Although it may appear that this action presents the correctness of that opinion, the issues as framed by the record are entirely different. The Attorney General was responding to the narrow legal question posed, i.e., whether a 'leasehold' interest in public trust property is taxable. Tax liability is sought here on a broader basis, i.e., that lessees are the 'owners' of their respective properties.

As the discussion which follows indicates, the record demonstrates conclusively that we are not dealing with 'lease-hold' interest." 618 P.2d at 904.

Respondents asserted in the District Court among other things that Petitioner had no contract of exemption, the Petitioner had expressly agreed to pay ad valorem taxes, that Petitioner was the owner of the project, that Attorney General Opinion #79-168 was neither applicable nor a "legislative act" and that Article 10 §5 of the Oklahoma Constitution precluded the existence of a valid contract of exemption:

"The power of taxation shall never be surrendered, suspended, or contracted away . . ." OKLA. CONST. art. 10, §5.

Respondents moved for Summary Judgment and the District Court, on March 25, 1982, after reviewing the pleadings, briefs, affidavits, admissions, interrogatories, stipulations, documents, depositions and exhibits, granted Summary Judgment to Respondents holding, among other things:

"That Article 10 Section 5 of the Oklahoma Constitution prohibits a contract which surrenders, suspends or contracts away the power of taxation and, although its existence is disputed, such contract, even if it could be established, would be void and contrary to law."

(R. 703-704, Journal Entry)

Petitioner appealed the decision of the District Court to the Supreme Court of Oklahoma alleging impairment of contract. On September 17, 1983, the Oklahoma Supreme Court held:

"GMC concedes that its assembly plant would be taxable under *Dunbar* but for the tax abatement agreement.

* * *

We will now consider the enforceability of the alleged tax abatement. *GMC did not introduce the agreement into the record . . .* In its journal entry of judgment the trial court in referring to the agreement said 'although its existence is in dispute, such contract, even if it could be established, would be void and contrary to law.'

The lease agreement between GMC and OIA did not spell out the tax abatement agreement but it did mention ad valorem taxes . . . the parties agree that in the event the State of Oklahoma or any of its subdivisions shall demand the payment of any general or ad valorem tax that GMC would pay the tax.

* * *

The purported tax abatement contract was not in accord with Oklahoma law at the time it was made.

* * *

Our decision in *Dunbar* is controlling in the case at bar and GMC's property is subject to ad valorem taxation unless the alleged tax abatement agreement is enforceable. The Federal Constitution does not protect unenforceable contract rights. The alleged agreement is void because no public official or public agency could constitutionally grant the tax exemption contained in the agreement. Since such agreement is unenforceable, GMC is not entitled to the tax relief it sought." (See Appendix A-1 through A-8 to the Petition for Certiorari)

On July 26, 1983, on Petition for Rehearing, the Oklahoma Supreme Court further clarified its ruling and upheld the assessment (See Appendix A-9 through A-12 to

Petition for Writ of Certiorari). On October 4, 1983, the Oklahoma Supreme Court supplemented its opinion on Petition for Rehearing and upheld the assessment (See Appendix A-13 through A-20 to Petition for Writ of Certiorari).

REASONS FOR DENYING THE WRIT OF CERTIORARI

Certiorari should be denied because:

1. No contract existed, *de jure* or *de facto*, to be impaired.
2. State court decisions below did not decide the issue of impairment of contract.
3. An alleged contract which is unlawful and void *ab initio* under a valid pre-existing state constitutional provision is not protected by the Contract Clause of the Federal Constitution.

I.

NO FEDERAL QUESTION IS PRESENTED FOR THIS COURT TO REVIEW BECAUSE NO CONTRACT EVER EXISTED BETWEEN THE PARTIES AND THERE- FORE THE CASE DOES NOT INVOLVE THE CON- TRACT CLAUSE.

Petitioner claims to be exempt from the payment of ad valorem taxes because of the purported "agreement" it had with the OIA. Generally, "a taxpayer claiming immunity from tax has the burden of establishing his exemption." *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964). Because Petitioner is the proponent of the contract it has the burden of proving its existence. *Owens v. Sun Oil Co.*, 482 F.2d 564 (10th Cir. 1973).

A. No Contract Exists *De Jure*

The existence of the contract is a matter of state law even though this Court makes an independent examination of the facts. *Appleby v. City of New York*, 271 U.S. 364 (1926); *State v. Brand*, 303 U.S. 95 (1938). OKLA. STAT. tit. 15, §2 (1981), provides:

It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and,
4. Sufficient cause or consideration.

These essential elements of a contract are not fulfilled in this case.

1. Parties Are Incapable of Contracting

Petitioner claims that the State itself was a party to the tax exemption agreement. However, the State neither levies nor receives the benefit of ad valorem taxes and would be powerless to agree to such exemption even if taxes could be contractually waived. Such taxes pertain only to county government.

"No ad valorem tax shall be levied for State purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes." OKLA. CONST. art. 10, §9, para. 2.

Two recent state decisions which Petitioner attempts to distinguish from this case, *Chemical Bank v. Wash. Pub-*

lic Power Supply System, 666 P.2d 329 (Wash. 1983), and *Asson v. City of Burley*, 670 P.2d 839 (Idaho 1983), involve contracts made by a utility. The courts ruled that the officials executing the contracts had exceeded their constitutional authority and that the contracts were void. See also, *Mountain St. Tel. & Tel. Co. v. Ogden City*, 487 P.2d 849 (Utah 1971). The same circumstances are alleged in this case; hence there is no contract.

2. Parties Did Not Consent

There existed no consent by any official, county or state, to exempt petitioner from ad valorem taxes, as will be subsequently shown.

3. The Purported Agreement Did Not Have a Lawful Object

A contract cannot be for an unlawful purpose. Unlawful contracts include those which are contrary "to an express provision of law." OKLA. STAT. tit. 15, §211 (1981).

The alleged agreement is plainly contrary to the express provisions of the constitution of the State of Oklahoma.

"The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects." OKLA. CONST. art. 10, §5.

It is important to note that the trial court, in sustaining Respondent's Motion for Summary Judgment, specifically addressed this fundamental Oklahoma law in its findings:

"That Article 10, Section 5 of the Oklahoma constitution prohibits a contract which surrenders, suspends

or contracts, away the power of taxation and, although its existence is disputed, such contract even if it could be established, would be void and contrary to law." (Emphasis added)

The alleged agreement is also contrary to another express provision of the Constitution of the State of Oklahoma.

"The legislature shall pass no law exempting any property within [sic] this state from taxation, except as otherwise provided in this Constitution." OKLA. CONST. art. 5, §50.

This provision was construed in *County Assessor v. Carpenter and Joiners*, Local 329, 211 P.2d 790 (Okla. 1949), as follows:

"[The Legislature] is without power to grant exemptions other than those recognized by the Constitution or to enlarge the exemptions so recognized." 211 P.2d at 794.

By a clear constitutional prohibition, the people of Oklahoma have foreclosed any favoritism of taxpayers. The purpose of the purported agreement is obviously unlawful.

In *City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79 (1891), a water company claimed that the assessment of taxes impaired its tax exemption contract with the city. The Louisiana constitution provided, however, that the legislature had no power to exempt property from taxation except as used for church, school or charitable purposes. This Court dismissed the case for lack of federal jurisdiction:

"There are several reasons, however, why the city cannot claim that this contract was impaired by subse-

quent legislation: first, because the contract itself . . . was *ultra vires* and void, and was so declared by the Supreme Court of Louisiana . . ." 142 U.S. at 88.

In *Mississippi and Mo. R.R. v. McClure*, 77 U.S. 511 (1871), this Court was called upon but declined to determine the validity of bonds which had been held by the state supreme court to be void and forbidden by the state constitution.

"The question of the validity of the bonds is not one of federal jurisdiction . . . [T]he State has passed no law upon the subject and the Constitution of the State . . . was in force when the bonds were issued." 77 U.S. at 515, accord, *Lake Superior Consol. Iron Mines v. Lord*, 271 U.S. 577 (1926).

Respondent submits the same principle applies here.

B. No Contract Exists *De Facto* Because No Consent Was Ever Given to an Exemption

The record reflects no agreement to exempt Petitioner from payment of ad valorem taxes. Significantly, Petitioner never introduced the alleged agreement into the record. The existence of a contract exempting one from taxation cannot be lightly inferred.

"Even if the borough could have made a contract of exemption . . . there is nothing to show that it did so. . . . On the contrary . . . where one relies upon an exemption both the powers to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the public. Here there is not only no language of exemption, but a positive statement on the part of the lessee to pay the public taxes on the land. In compelling them to

do so the contract is enforced instead of impaired."
J. W. Perry Co. v. Norfolk, 220 U.S. 472, 480 (1911).
(Emphasis added)

Contracts of exemption must be construed narrowly and strictly. *Atlantic Coast Line R. v. Phillips*, 332 U.S. 168 (1947); *Keefe v. Clark*, 322 U.S. 393 (1944). Under Oklahoma law, any doubt as to the intent of an agreement must be resolved against the grant of exemption.

"Whoever insists that any particular property is not subject to the same burden as imposed by law on the same character of property similarly circumstanced, has the burden of proof, and must make it clear that by contract or otherwise the property is beyond its reach. Claims of exemption from taxation must be plainly and unmistakably supported by express grant. It cannot exist by implication only. A doubt is fatal to the claim." *Oklahoma City v. Shields*, 22 Okla. 265, 293, 100 P. 559, 571 (1908).

As the statement reflects, there was no exemption agreement with the Governor or the Attorney General of Oklahoma, nor with the Oklahoma Tax Commission. None of the parties here made such an agreement. Petitioner owns the project site in fee simple and *explicitly agreed in its "Lease" to pay all ad valorem taxes assessed on the site*. There was obviously no meeting of the minds as to a tax exemption agreement.

II.

**THE ALLEGED CONTRACT WAS NOT IMPAIRED BY
LEGISLATIVE ACTION WITHIN THE MEANING OF
THE FEDERAL CONSTITUTION.**

Although Petitioner claims there is legislative action on the part of the Attorney General of Oklahoma, this position is entirely erroneous. The legislative authority of the State is vested solely in the state legislature. OKLA. CONST. art. 5, §1. The Attorney General is an executive officer of the State, and may not exercise any legislative functions. OKLA. CONST. art. 6, §1, art. 4 §1. He is required by statute, to give his opinion on law at the request of certain public officials. OKLA. STAT. tit. 74, §18b(e); *Grand River Dam Auth. v. State*, 645 P.2d 1011 (Okla. 1982). He may not give advice to private citizens or corporations, but gives opinions "not in the exercise of any power inherent in the office to make 'rules' or law, but in fulfillment of his duty to give legal advice to those who administer the government of the state." *Id.*, at 1017. The actions of the Attorney General of Oklahoma do not constitute legislative action.

Parenthetically, the actions complained of do not impair Petitioner's alleged contract. OKLA. ATTY. GEN. OPIN. 69-159 concluded that leasehold interests in property owned by public trusts were not taxable. OKLA. ATTY. GEN. OPIN. 69-156 concluded that leasehold interests in property owned by public trusts were taxable and withdrew the contrary conclusion in 69-156. Petitioner concedes that it was the taxable owner of the property in question and, therefore, that it was not a lessee. Neither Attorney General's opinion applies to Petitioner. Neither opinion impairs the alleged contract.

It is well settled that Respondents are not estopped by the acts of public officials who entered into an arrangement or agreement to do or cause to be done what the Oklahoma constitution does not permit. *Harris v. State*, 251 P.2d 700. (Okla. 1952); *accord, Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). One who deals with a public official must ascertain that he who purportedly acts for the state stays within the scope of his authority. *Federal Crop Insur. Corp. v. Merrill*, 332 U.S. 380 (1947); *Harris, supra*. Therefore, no estoppel can grow out of negotiations with a public official who acts beyond his powers. *United States v. Stewart*, 311 U.S. 60 (1940); *Bonney v. City of Britton*, 214 P.2d 249 (Okla. 1950).

Because the public officials involved here have no authority to execute a contract of tax exemption, the alleged "assurances" made to Petitioner were no more than erroneous and unauthorized opinions. Mere opinions of public officials cannot estop the taxing authorities. *Utah v. United States*, 284 U.S. 534 (1932); *State ex rel. Comm'rs of Land Office v. Shull*, 279 P.2d 339 (Okla. 1955). Even where one has relied upon opinions of public officials to one's detriment, an estoppel will not lie. *Federal Crop Insur. Corp. v. Merrill, supra*; *James v. State*, 15 P.2d 591 (Okla. 1932). The Contract Clause is infringed only when a legislative enactment impairs the contract. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924); *Barrows v. Jackson*, 364 U.S. 249, 260 (1953).

A "statute of a state" has been defined by this Court to mean "any enactment, from whatever source originating, to which a state gives the force of law. . . ." *Williams v. Bruffy*, 96 U.S. 176, 182-83 (1880). See, *John P. King Mfg.*

Co. v. City Council, 277 U.S. 100 (1928). During its last term, this Court discussed the nature of legislative action in *Perry Educ. Assn. v. Perry Local Educ. Assn.*, ____ U.S. ___, 103 S.Ct. 948 (1983). The argument that a collective bargaining agreement was legislative in character because it was intended "to be observed and applied in the future" was rejected. "Not every government action which has the effect of law is legislative action." ____ U.S. ___, 103 S.Ct. at 953.

In this case, no action was taken by the Oklahoma Legislature which impaired Petitioner's "contract". Hence, there is no Contract Clause question presented for this Court's review.

III.

THIS COURT LACKS JURISDICTION TO HEAR PETITIONER'S ARGUMENTS BASED UPON THE CONTRACT, DUE PROCESS AND TAKING CLAUSES OF THE FEDERAL CONSTITUTION.

The present case comes before this Court on a Petition for a Writ of Certiorari. Petitioner asserts that this Court's jurisdiction is founded on 28 U.S.C. §1257, which provides:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States or where any title, right, or immunity

is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

It is a fundamental principle that the Petitioner's circumstances must fulfill the requirement of §1257 in order for it to be heard by this Court. *F. G. Oxley Stove Co. v. Butler Co.*, 166 U.S. 648 (1897); *Baldwin v. Kansas*, 129 U.S. 52 (1889).

Petitioner seeks to come within the purview of the provision for review "where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . ." From the earliest days of this Court, it has been held that the claim to a constitutional right must have been presented to and decided by the state court whose judgment is being reviewed.

"We held early on that §25 of the Judiciary Act of 1789 [the ancestor of §1257] furnished us with no jurisdiction unless a federal question had been both raised and decided in the state court below. As Justice Story wrote in *Crowell v. Randell*, 10 Pet. 368, 391, 9 L.Ed. 458 (1836), 'If both of these requirements do not appear on the record, the appellate jurisdiction fails.'" *Illinois v. Gates*, ____ U.S. ___, 103 S.Ct. 2317, 2321 (1983).

The federal right must be declared explicitly in the state court; it must be claimed "unmistakably". *F. G. Oxley Stove Co. v. Butler Co.*, 166 U.S. 648 (1897). The federal right must be passed upon by the state court.

"[I]t must appear from the record, by clear and necessary intendment, that the federal question was directly involved, so that the state court would not have given judgment without deciding it. . ." *Sayward v. Denny*, 158 U.S. 180, 184 (1895).

A. Contract Clause — Opinion by State Court

Petitioner has artfully, but in a grossly misleading manner, informed this Court:

"In reaching its decision, the Oklahoma Supreme Court assumed that petitioner and the State did in fact enter into a contract pursuant to which the Oklahoma City plant was to be exempt from property taxes for twenty years. (Pet., 8)

This statement was obviously inserted to convince this Court that a contract existed in order to invoke jurisdiction under the federal Constitution. The Oklahoma Supreme Court in fact states in pertinent part:

"We will assume, *arguendo*, that OIA, a state agency, entered into the tax abatement agreement with GMC . . . (Pet., A-7) (Emphasis added).

Thus, the Oklahoma Supreme Court was clearly addressing the lack of power of state officials to enter into such contract, rather than assuming a contract existed which could be arguably used for federal jurisdictional purposes.

B. Due Process, Taking Clauses — Opinion by State Court

Further, the Due Process and Taking Clause arguments were not unmistakably presented to the Oklahoma Supreme Court. The Petition-in>Error did not mention the Taking Clause of the U. S. Constitution, Amendment V. Petitioner's Brief-in-Chief in the court below propounded the Due Process Clause in three scant pages and referred weakly but once to the Taking Clause. The briefs in the trial court never covered either clause. Surely it cannot be said that the Due Process and Taking Clauses were clearly presented

below. Furthermore, neither clause was passed upon by the Oklahoma Supreme Court. The court explicitly ruled, "In view of our decision here, we find it unnecessary to consider the force and effect of . . . the Fourteenth Amendment to the U. S. Constitution." This Court should not review a constitutional decision that never occurred. The Oklahoma Supreme Court manifestly gave judgment without deciding the Due Process and Taking Clause issues. Under such circumstances, this Court has no jurisdiction to consider the issue now. *Dewey v. City of Des Moines*, 173 U.S. 193 (1899). By refusing to hear Petitioner's Fifth Amendment arguments, this Court will be sure to avoid the consideration of a constitutional argument on an inadequate record and to maintain the proper relationship between state and federal courts. *Illinois v. Gates*, ____ U.S. ___, 103 S.Ct. 2317, 2323 (1983).

IV.

JUDICIAL RETROACTIVITY IS NOT A VALID ISSUE IN THIS CASE.

The petition is largely devoted to the issue of whether the decision of the Oklahoma Supreme Court was correct in light of *Lemon v. Kurtzman*, 411 U.S. 192 (1973), and *Great No. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932). Those cases, concerning the nonretroactivity of the judicial decision, do not apply here. The Oklahoma constitution has always prohibited contracts of tax exemption. OKLA. CONST. art. 5 §50; art. 10 §5. Further, the constitution and statutes of the State of Oklahoma explicitly state that all property which can be taxed *must* be taxed.

"All property which may be taxed ad valorem shall be assessed for taxation. . ." OKLA. CONST. art. 10 §8.

"All property in this state, whether real or personal, except that which is specifically exempt by law . . . shall be subject to ad valorem taxation." OKLA. STAT. tit. 68 §2404 (1981).

"Real property, for the purpose of ad valorem taxation, shall be construed to mean the land itself . . . and all buildings, structures and improvements. . . ." OKLA. STAT. tit. 68 §2419 (1981).

In addition, the granting of a tax abatement to the Petitioner would accomplish indirectly what the Oklahoma Constitution affirmatively prohibits.

"The legislature shall pass no law granting to any . . . corporation . . . any exclusive rights, privileges, or immunities with the State." OKLA. CONST. art. 5 §51,

"[N]or shall the State . . . make donation . . . by tax, or otherwise, to any company, association, or corporation." OKLA. CONST. art. 10, §15.

Thus, the ruling of the lower court was constitutionally compelled and anticipated, and no contradictory precedent exists.

A direct foreshadowing of the decision below is the case of *State v. Ford*, 434 P.2d 934 (Okla. 1976), in which the court held that a statute exempting industrial tracts of 40 acres or larger was unconstitutional.

"That part of 11 O.S. Supp. 1965, Sec. 481 which provides that 'tracts of land in excess of forty acres shall not be subject to city taxes when located within a city or town and when used for industrial or commercial purposes' is not authorized by Art. 10, Sec. 6, and the territorial statute, Sec. 458, supra, unless authorized under 11 O.S. 1861 Sec. 6, and constitutes no authority for classifying such tracts as exempt from city taxes." 434 P.2d at 938.

The Attorney General also foreshadowed Petitioner's being a taxable owner in OKLA. ATTY. GEN. OPIN. 74-229:

"Title to the facility is indeed normally held by the industrial public trust authority during the time in which its revenue bond indebtedness is outstanding to allow the trust to grant a mortgage and security for the bondholders; however, in almost all situations the private industrial concern has an option to purchase the facility for a nominal sum after the retirement of all indebtedness by the private concern *and thus has equitable ownership of the facility during the debt term.*" 7 OKLA. ATTY. GEN. OPIN. 210, 212 (Emphasis added).

The Oklahoma Supreme Court has repeatedly held in a long series of cases, that the equitable owner is subject to full tax liability or property purchased from an exempt governmental entity.¹

The most recent case foreshadowing the decision below is *State ex rel. Poulos v. St. Bd. of Equal.*, 552 P.2d 1134 (Okla. 1975), in which the court stated:

"The legislature has recognized that a system which does not equalize ad valorem assessments throughout the state is unfair and invidiously discriminatory. It is provided by the School Code of 1971, 70 O.S. 1971 §18-102:

'The Legislature recognizes that it would be unfair to the taxpaying citizens of the state to base a

¹ *Rose v. Stalcup*, 190 P. 396 (Okla. 1920); *Morris v. Bd. of Comm'rs*, 177 P. 900 (Okla. 1917); *Boone v. Porter*, 146 P. 584 (Okla. 1915); *Bowls v. Oklahoma City*, 104 P. 902 (Okla. 1909); *accord, Sears v. Fair*, 397 P.2d 134 (Okla. 1964); *Equitable Royalty Corp. v. State*, 352 P.2d 365 (Okla. 1960); *Magnolia Petroleum Co. v. State*, 322 P.2d 188 (Okla. 1957); *Stevens v. Patten*, 50 P.2d 1106 (Okla. 1935).

system of state financial aid to schools upon the amounts of local ad valorem taxes collected for education as this act does without equalizing ad valorem assessments throughout the state. *It is the intention of the Legislature every parcel and item of taxable property in the state will be assessed at the same percentage of its fair cash value.*" 552 P.2d at 1136 (Emphasis added).

CONCLUSION

Succinctly, Petitioner seeks to invoke jurisdiction of this Court based upon impairment of a contract, but without showing the existence of the purported "contract" either in fact or in law. Section 13 of the lease agreement, upon which Petitioner so heavily relies, certainly cannot be considered an agreement of tax exemption, but rather an agreement by Petitioner to pay all taxes imposed.

The opinion of the Attorney General is just that—an opinion as to the law. It is not binding upon any privately owned corporation such as Petitioner's, but rather is intended to provide legal guidance for public officials in the performance of their duties.

On January 29, 1980, the Supreme Court of Oklahoma in *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900 (Okla. 1980), ruled that the substance of a transaction, not the label given it by the parties, controls the legal nature of the transaction and that purported "lessees" of public trusts were the equitable, legal and taxable owners of the industrial facility. Petitioner participated therein as *amicus curiae*. In January, 1980, Respondent County Assessor assessed Petitioner for the land and buildings which consti-

tute the Oklahoma City project. Respondent's action was plainly foretold by the constitutional, statutory and common laws of Oklahoma.

Nonetheless, Petitioner chose to rely upon an opinion of the Attorney General which, ironically, was not even applicable to its particular circumstances.

Finally, Petitioner acted without benefit of a single judicial decision to support its view, and in the face of unequivocal provisions to the contrary existing in the constitution and statutes of the State of Oklahoma.

Upon this record, Petitioner now seeks review via Certiorari. Respondent respectfully submits that the record of this case justifies and requires denial of the Petition.

Respectfully submitted,

ROBERT H. MACY
District Attorney of
Oklahoma County, Oklahoma

FRANK E. WALTA
Assistant District Attorney
Counsel of Record

202 Robert S. Kerr Avenue
Oklahoma City, Okla. 73102

Attorneys for Respondent

March, 1984

APPENDIX A

[Filed July 23, 3:13 p.m. 1973]

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That LAWYERS TITLE INSURANCE CORPORATION, a Virginia Corporation, Party of the First Part, in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration, in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto GENERAL MOTORS CORPORATION, a Delaware corporation, whose address is 3044 West Grand Boulevard, Detroit, Michigan, Party of the Second Part, the following described real property and premises, situated in Oklahoma County, State of Oklahoma, to-wit:

A parcel of Land located in the South One-Half (S/2) of Section 27, Township 11 North, Range 2 West of the Indian Meridian and the North One-half (N/2) of the North One-Half (N/2) of Section 34, Township 11 North, Range 2 West of the Indian Meridian, all in Oklahoma County, Oklahoma, said parcel being more particularly described as follows:

BEGINNING at the SW Corner of Section 27, T 11 N, R 2W; Thence North 0° 21' 48" West along the West line of said Section 27 a distance of 2632.18 feet; Thence South 89° 43' 51" East a distance of 5245.81 feet to a point on the East line of said Section 27; Thence South 0° 12' 16" East along the East line of Section 27 a distance of 2635.83 feet to SE Corner of Section 27, said point also being the NE Corner of Section 34, T 11 N, R 2 W; Thence North 89° 41' 24" West along the North line of said Section 34 a distance of 50.00 feet; Thence South 0° 26' 14" East parallel to and 50.00 feet West of the East line of said Section 34 a distance of 491.45 feet to a point; Thence South 3° 58' 14" West a distance of 518.85 feet; Thence North 89° 39' 34" West 800.00 feet;

[APPENDIX]

Thence South 79° 01' 50" West a distance of 127.47 feet; Thence North 89° 39' 34" West a distance of 1571.52 feet; Thence Northwesterly on a curve to the right having a radius of 28,472.89 feet a distance of 1341.54 feet; Thence South 81° 39' 38" West a distance of 126.92 feet; Thence Northwesterly on a curve to the right having a radius of 28,497.89 feet a distance of 1068.50 feet; Thence North 8° 26' 26" West a distance of 304.06 feet; Thence North 2° 57' 37" West a distance of 585.78 feet; Thence North 0° 23' 09" West parallel to and 50.00 feet East of the West line of said Section 34 a distance of 60.00 feet; Thence North 89° 41' 24" West along the North line of said Section 34 a distance of 50.00 feet to the Northwest Corner of Section 34, T 11 N, R 2 W, said point also being the Southwest Corner of Section 27, T 11 N, R 2 W and the point of beginning; LESS AND EXCEPT THE FOLLOWING:

* * *

(CONSIDERATION LESS THAN \$100.00)

together with all the improvements thereon and appurtenances thereunto appertaining.

TO HAVE AND TO HOLD said real estate, together with all and singular the rights and appurtenances thereunto in anywise belonging, subject to those exceptions 1 through 43 listed herein above, and Grantor does hereby bind itself, its successors and assigns, to warrant and forever defend all and singular the said real estate unto Grantee and its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through, or under Grantor, but not otherwise.

Signed and delivered this 6th day of June, 1973.

LAWYERS TITLE INSURANCE CORPORATION

By (s) *Marvin C. Bowling, Jr.*
Vice President

[S E A L]

ATTEST:

(s) *Hazel T. Cole*

Assistant Secretary

[Notary Certification omitted this printing]

APPENDIX B

October 5, 1976

MEMO TO: Phil Hoffman

FROM: Harry Birdwell

RE: Developments in the October 4th meeting at
the Oklahoma State Tax Commission Build-
ing regarding Tax Relief for the Proposed
GM Facility in Oklahoma City

1/ Sam Hammons, Administrative Assistant to Governor Boren, pledged the Governor's support for negotiable tax relief measures for GM. Hammons also further indicated that Governor Boren would have been present personally had he not presently been in Korea.

2/ Two of the three members of the Oklahoma State Tax Commission, Commissioners Leininger and Merrill, repeated the Commission's established policy of exempting construction materials from the 4% Oklahoma City sales tax, so long as record title of industrial buildings remains in a public trust organized under Title 60 Section 176 of the Oklahoma Statutes.

3/ Oklahoma Attorney General Larry Derryberry reiterated the Attorney General's opinion issued by former Attorney General G. T. Blankenship on March 17, 1969, dealing with the tax exempt status of real property which is held by public trust created in strict accordance with Title 60 Sections 176 and 177. The Attorney General further stated that he would make every effort to secure an answer related to separate ad valorem taxation of buildings and land.

4/ Commissioner Merrill discussed the free port taxation in Oklahoma, indicating that goods not detained in Oklahoma for more than nine months shall not be taxed as inventory items.

2b

[APPENDIX]

5/ All other participants in the meeting pledged their full and unconditional support to assist GM in achieving reasonable and desirable tax relief.

(s) *Harry Birdwell*

APPENDIX C

**THE ATTORNEY GENERAL
OF OKLAHOMA**
Oklahoma City, Oklahoma 73105

**G. T. BLANKENSHIP
ATTORNEY GENERAL**

March 17, 1969

The Honorable Dewey F. Bartlett
Governor of Oklahoma
State Capitol Building
Oklahoma City, Oklahoma

Opinion No. 69-156

Dear Sir:

The Attorney General has had under consideration your recent letter in which you advise:

"The Authority would acquire a parcel of land located in Oklahoma City from private persons. . . . The Authority would then enter into a Lease Agreement with an industrial tenant. The agreement would require the industrial tenant to pay for all buildings, structures, fixtures, machinery, equipment, other tangible personal property, facilities and improvements necessary for the construction and equipping of a manufacturing facility. Title to all such property would be vested in the Authority subject to the industrial tenants' leasehold therein. The industrial tenant would pay as rent a portion of the land's cost over a three year period but would lease the land and the improvements just mentioned for 25 years within a 25 year renewal option. The industrial tenant would have the right to purchase the facilities at any time. In addition, the industrial tenant would pay as rent an amount which reflects the tenant's contribution to the community's welfare made in the expectation that

[APPENDIX]

neither the project nor the tenant's interest therein would be subject to ad valorem taxation. . . ."

You request an opinion with respect to the following questions:

"1. Are the land, buildings, structures, machinery, equipment, fixtures, other personal property, facilities, improvements, or any of them, owned by the Authority and subject to a Lease Agreement along the lines discussed above, subject to ad valorem taxation by the State of Oklahoma, the County of Oklahoma County, the City of Oklahoma City, or any other agency or instrumentality of the State of Oklahoma?

"2. Is the leasehold or possessory interest of the industrial tenant in such land, buildings, structures, machinery, equipment, fixtures, other personal property, facilities, improvements, or any of them, owned by the Authority and subject to a Lease Agreement along the lines discussed above, subject to ad valorem taxation by the State of Oklahoma, the County of Oklahoma County, the City of Oklahoma City, or any other agency or instrumentality of the State of Oklahoma?"

With regard to your question No. 1, Article X, Section 6, of the Constitution of this State, in pertinent part, provides:

". . . all property of the United States and of this State and of counties and of municipalities of this State, . . . shall be exempt from taxation."

Other pertinent provisions are 68 O.S. Supp.1968, §2405, which provides:

"The following property shall be exempt from taxation . . . (b) All property of this State, and of the counties, school districts, and municipalities of this State. . . ."

Title 68 O.S. Supp.1968, § 2404, states:

"All property in this State, whether real or personal, except that which is specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to an ad valorem taxation."

Title 68 O.S. Supp.1968, § 2419, states:

"Real property, for the purpose of ad valorem taxation, shall be construed to mean the land itself, and all rights and privileges thereto belonging or in any wise appertaining, such as permanent irrigation, or any other right or privilege that adds value to real property, and all mines, minerals, quarries and trees on or under the same, and all buildings, structures and improvements or other fixtures of whatsoever kind thereon, exclusive of such machinery and fixtures on the same as are, for the purpose of ad valorem taxation, defined as personal property."

Title 68 O.S. Supp.1968, § 2426, provides:

"(a) Property subject to ad valorem taxation shall, unless otherwise provided, be listed for taxation by the owner thereof or his duly authorized agent.

"(b) Property belonging to or controlled by the following shall be listed by the following persons or their duly authorized agents:

" . . .

"(4) A person for whose benefit it is held in trust, by the trustee . . ."

Assuming that the Oklahoma Industrial Authority has been in all respects created in strict accordance with 60 O.S. 1961, §§ 176 and 177; that the title to the project will vest in the Authority; and that the beneficial interest in the trust estate has been acquired on behalf of Oklahoma County,

[APPENDIX]

it is the opinion of the Attorney General that the answer to your question No. 1 must be in the negative in that no part of any property owned by the Authority will be, under the existing law, subject to ad valorem taxation by the State of Oklahoma, County of Oklahoma, Oklahoma City, or any other agency or instrumentality of the State of Oklahoma.

Article I, Section 1.2 of the Lease Agreement provides:

"... the term "Project" does not include (i) fixtures, machinery, equipment, other personal property, facilities and improvements, title to which has been retained by the Company pursuant to Section 3.2, (ii) fixtures, machinery, equipment, other personal properties, facilities and improvements removed by the Company from the Project pursuant to Section 3.3, (iii) land (whether improved or unimproved), buildings, structures, or any parts thereof, removed by the Company from the Project pursuant to Section 3.4, or (iv) raw material, in-process products or finished goods."

Accordingly, as to all the enumerated items, the opinion expressed above will not apply and all such items will be subject to taxation in accordance with general law.

With respect to your question No. 2, on August 27, 1968, the citizens of Oklahoma adopted an amendment to Article X, Section 6A of the State Constitution, to become effective January 1, 1969, exempting from ad valorem or other taxes, intangible personal property as defined therein.

In pertinent part, the amendment provides exemption from taxation for:

"..."

"(f) All interests in property held in trust or on deposit within or without this State, and whether or not evidenced by certificates, shares, or other written evidence of beneficial ownership."

Leasehold interest such as that here involved and evidenced by a written instrument have variously been defined as "intangible personal property," "chattels real," and "incorporeal in nature." (See *Words & Phrases*, Permanent Ed., Vol. 24A, pp. 284 and 285)

In *State v. Bare*, 60 W.Va. 483, 56 S.E. 390, 393, the Court, in the body of its opinion, treated the question of taxation of a leasehold interest as follows:

"A 'leasehold' is the right to use property upon which a lease is held for the purpose of the lease. It is intangible property, which the law recognizes as having value, but which is incorporeal in its nature. It is not the property upon which the lease is held nor the property used in its exercise. In determining the taxable value of the leasehold, the pecuniary value of the property used in connection therewith or the use of which constitutes the leasehold estate may not be taken into consideration. The land which constitutes the subject of the leasehold is taxed, not as a leasehold, nor in the name of the lessee, but as land, in the name of the owner, and is not to be taxed over again in the name of the lessee, on the theory that it constitutes part of the leasehold. Nor are the improvements on the land, whether they belong to the land-owner or the lessee, to be taxed under the designation of 'leasehold.' If they belong to the owner of the land, they are charged to him, either as land or as personal property. Their value is not to be included in, or taken to make up, the value of the intangible thing, the leasehold."

Accordingly, since the leasehold interest of an industrial tenant is deemed to be personal intangible property and to fall within the purview of the recently adopted amendment to Article X, § 6A of the Constitution of this State, it is the opinion of the Attorney General that such leasehold interest is not subject to ad valorem taxation by the State of Okla-

[APPENDIX]

homa or by Oklahoma County or any other agency or instrumentality of this State that may now or hereafter be authorized to impose such taxes on real or personal property situated within their jurisdiction.

Sincerely,

FOR THE ATTORNEY GENERAL

(s) *Carl G. Engling*

ASSISTANT ATTORNEY GENERAL

APPROVED IN CONFERENCE

(s) *G. T. Blankenship*

ATTORNEY GENERAL

APPENDIX D

[Recorded or filed April 12, 1978]

ABSOLUTE GRANT OF EXCLUSIVE RIGHT TO USE

WITNESS this Agreement effective as of 1 April 1978.

WHEREAS, General Motors Corporation, organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of Oklahoma, (hereinafter referred to as "General Motors") which corporate address is 3044 West Grand Boulevard, Detroit, Michigan 48202, is the owner of certain realty in Oklahoma County, State of Oklahoma, more particularly described on Exhibit "A" attached hereto; and

WHEREAS, Oklahoma Industries Authority, an agency of the State of Oklahoma, as grantee, (hereinafter called "OIA") is desirous of obtaining a grant of an exclusive right to use said realty;

WITNESS THIS AGREEMENT:

General Motors herewith gives and grants an exclusive right to use all of the herein described realty to OIA retaining, only, the bare legal title of surface and minerals of record. The parties recognize that the bare legal title of surface and minerals will remain in General Motors and will be subject to ad valorem taxation as now and hereafter existing under the laws of the State of Oklahoma.

The purpose of this Absolute Grant of Exclusive Right to Use for a twenty (20) year plus one (1) day period (and for such longer period of time as is requisite to retire the bonds as is envisioned by the lease agreement of even date) is to enable OIA to erect thereon certain improvements contemplated between the parties and to lease improvements on the estate granted herein for a period of twenty (20) years from OIA to General Motors under one certain lease agreement of even date herewith.

[APPENDIX]

The exclusive right to use and grant herein made from General Motors to OIA is without representation or warranty as to previous mineral conveyances, if any; easements and rights of way of record, if any; zoning regulations, if any; and OIA recognizes that it is familiar with said conditions and will likewise make no warranties in the lease from OIA to General Motors as is contemplated.

The parties, by this document are severing an exclusive right to use in favor of OIA which will be the subject of said lease agreement from OIA to General Motors and General Motors is retaining the bare legal title of the surface and mineral estate all in accordance with lease of even date.

The parties recognize that as a result of this Grant an estate for years and absolute right to use will be created in OIA and the only remaining incident of ownership is the surface and minerals will be the record title in General Motors and the severance for all other purposes including ownership of all improvements whether surface or subsurface in OIA; the parties recognize that as a result of this severance of the surface and minerals from the Grant herein made will mean that the improvements will not become a part of the realty and will at all times be owned exclusively by OIA and shall not become a part of the surface and mineral title herein retained by General Motors.

The parties agree to cooperate in implementing the sense of this severance by any further documentation required to ensure that the surface and mineral title retained by grantor will be absolute.

All of the remainder of the rights and remedies of the parties will be governed by that certain lease with OIA as lessor and General Motors as lessee of even date herewith.

Any common law or statutory merger principle will not be applicable to the lease from OIA to General Motors dated simultaneously herewith.

Dated this 12th day of April, 1978.

GRANTOR:

GENERAL MOTORS CORPORATION
By (s) *P. J. Coletta*
Vice President

ATTEST:

(s) *Marguerite Novelli*
Assistant Secretary

GRANTEE:

OKLAHOMA INDUSTRIES
AUTHORITY
By (s) *Edward L. Gaylord*
Chairman

(s) *Harry Birdwell*
Assistant Secretary

[Notary Certifications and "Exhibit A" (land description) attached to original, omitted this printing]

APPENDIX E

LEASE

This lease, executed in duplicate as of this 1st day of April, 1978, by and between Oklahoma Industries Authority, an agency of the State of Oklahoma; hereinafter called "Lessor", and General Motors Corporation . . . hereinafter called "Lessee";

WITNESSETH:

Section 1 For and in consideration of the rents to be paid and the covenants and agreements to be performed on the part of Lessee, as hereinafter set out, Lessor has demised and leased, and by these presents does demise and lease for the term, hereinafter set forth, unto Lessee all of Lessors interest in that certain tract and parcel of land situated in Oklahoma County, State of Oklahoma, and being more particularly described in Exhibit A, which is an estate owned by Lessor severed from the surface and minerals in accordance with an Absolute Grant of Exclusive Right to Use from Lessee to Lessor of even date herewith, together with all improvements thereon equipment of the Lessor located and to be installed therein. . . .

* * *

(b) As used herein, the term "the project" shall mean collectively the said real estate, the building and improvements subsurface, surface . . . and all machinery and equipment . . .

* * *

(c) the preparation of plans and specifications, the erection of all or any part of the improvements, and the acquisition of any machinery and equipment may be done by Lessee . . . Lessee agrees to construct, acquire, install and complete the project with all reasonable dispatch . . .

* * *

[APPENDIX]

(e) the total cost to Lessor of the project . . . shall in no event exceed one million dollars, (\$1,000,000.00) should such total be exceeded, the required excess funds shall be provided by Lessee

Section 3 (a) The term of this lease shall be twenty (20) years from the date hereof.

Section 4 To provide the funds referred to in Section 2(e) above, Lessor will issue or cause to be issued a series of coupon bonds . . . in the total principal amount of \$1,000,000. . . . The annual rental to be paid by Lessee for the project shall be:

(a) A sum equal to the annual debt service requirements of Lessor to pay interest on the bonds . . . the last payment . . . will be the amount required to pay the principal outstanding at maturity. . . .

* * *

Section 5 (a) Lessor shall not be required or obligated at any time to repair or maintain the project. . . .

* * *

Section 6 Lessor covenants that it is lawfully seized of the demised property of an Absolute Grant and Exclusive Right to Use for a period of twenty (20) years and one (1) day. . . .

* * *

Section 9 Possession of the demised property will be delivered to Lessee upon the commencement of the term of this Lease. . . .

* * *

Section 11 Lessee shall retain . . . at its expense . . . such fire, windstorm and extended coverage insurance as a prudent operator in the industry would maintain

* * *

* * *

Section 13 (a) Lessee shall pay all special assessments levied against the Project, and all personal property taxes assessed against all equipment and personal property of Lessee (not owned by Lessor under the terms of this Lease) placed on the Project during the term of the Lease. In the event of the creation of any special assessment district within which is situated all or any portion of the Project, Lessee at its option may protest in the name of Lessor under the applicable provisions of law the creation of such proposed assessment district without reference to or permission of the Lessor.

(b) In the event the State of Oklahoma, or any political subdivision thereof, shall demand of Lessor or Lessee the payment of any general or ad valorem tax on the property owned by Lessor, the party so notified shall promptly notify the other of such circumstance.

(c) Lessee may, at its own expense and in its own name and behalf, or in the name and behalf of Lessor, in good faith contest any such tax or assessment and, in the event of such contest, may permit the tax or assessment so contested to remain unpaid during the period of such contest or any appeal therefrom, if, during such period, enforcement of such contested item is effectively stayed, or the title of Lessor to any part of the Project is not otherwise materially endangered or subjected to loss or forfeiture. Lessor shall cooperate fully with Lessee in any such contest. Should any such tax or assessment be determined by the court of final jurisdiction to which the question may have been appealed to be due and owing, then the same shall be paid by Lessee.

(d) The parties recognize that as the Lessor is an agency of the State of Oklahoma, the Project here demised is not subject to ad valorem taxation under the Constitution and laws of the State of Oklahoma. Since

[APPENDIX]

the bare legal title (surface and minerals) to the Exhibit "A" realty (with all other rights to said realty having been severed in favor of Lessor under the Absolute Grant of Exclusive Right to Use of even date) remains in Lessee, Lessee will pay any and all ad valorem taxes assessed against the surface ownership of the Exhibit "A" realty promptly and in accordance with law now and hereafter existing as provided by law.

However, Lessee recognizes that it will use, require and impact municipal, county and school district services located in several counties. Accordingly, Lessee agrees that it will pay the above mentioned ad valorem taxes on the surface, plus thereafter commencing on the first day of December, 1979, and on a like date of each year thereafter during the term of this Lease, the sum of \$500,000.00 in addition to the rentals herein set out as rentals in lieu of ad valorem taxes which shall be distributed by the Lessor to such of those entities entitled to an apportionment of the same as the Lessor may determine to be in the areas and communities affected and as the Lessor determines to be in the public and communities' interests.

(e) Should the State of Oklahoma (i) assess or collect taxes from either Lessor or Lessee on the basis of the value of the whole or any part of the Project (being the leasehold estate herein delineated); or (ii) collect such taxes on any other basis designed to produce revenue in lieu of ad valorem taxes to be applied for the purposes to which ad valorem taxes are committed as of the date of this Lease; or (iii) abolish the levy of a tax upon tangible real or personal property calculated upon its value, then and in case of such events (a) of this Section shall become inoperative and the tax that shall be determined as the obligation of the Lessor because of the existence of the Project shall be paid by Lessee. Lessee may contest any such intended tax

or levy thereof in like manner and with like prerogatives as provided by Section 13(c) hereof.

* * *

Section 20 If all or substantially all of the Project is taken under the power of eminent domain . . .

* * *

(b) If the net condemnation award is in excess of the sum needed to pay and retire all such outstanding bonds . . . such excess shall be paid to Lessee.

* * *

Section 22 Lessor gives and grants to Lessee the right to purchase the project at any time . . . at a purchase price which should be the amount required to pay all outstanding principal of the bonds . . . plus interest . . . plus any applicable redemption premium, plus all expenses incidental to the redemption and retirement . . . plus \$1,000 . . .

In witness whereof, Lessor and Lessee have duly executed and fixed their hands and seals to this Lease this 12th day of April, 1978.

OKLAHOMA INDUSTRIES AUTHORITY

By (s) *Edward L. Gaylord*
Chairman

Attest: (s) *Harry Birdwell*
Assistant Secretary

GENERAL MOTORS CORPORATION

By (s) *P. J. Coletta*
Vice President

Attest: (s) *Marguerite Novelli*
Assistant Secretary

APPENDIX F

[Seal of the State of Oklahoma]

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL
STATE OF OKLAHOMA

State Capitol, Oklahoma City, Oklahoma 73105

July 31, 1979

The Honorable Helen Arnold
State Representaitve
218 E. 29
Tulsa, OK 74114

Opinion No. 79-168

Representative Arnold:

The Attorney General is in receipt of your request for an opinion . . .

* * *

Any discussion of tax exemptions must begin with the general principle that all property in the State of Oklahoma is presumptively taxable. Article V, § 50, of the Oklahoma Constitution states:

"The Legislature shall pass no law exempting *any property* within [sic] this State from taxation, except as otherwise provided in this Constitution." (Emphasis added)

From statehood to its most recent pronouncements, the Oklahoma Supreme Court has, in an unbroken chain of authority, held to the rule that statutes exempting property from taxation are to be strictly construed against the exemptions. London Square Village v. Okla. County Equalization and Excise Board, 559 P.2d 1224 (1977); Dairy Queen of Oklahoma v. Oklahoma Tax Commission, 205 Okl. 473, 238 P.2d 800 (1951); Board of Equalization v. Bonner, 185 Okl. 431, 93 P.2d 1077 (1930); Oklahoma City v. Shields,

[APPENDIX]

22 Okl. 265, 100 P. 559 (1908). If property of a public trust is to be exempted from taxation, the exemption must arise from a fair reading of the plain language of the Constitution.

* * *

The Oklahoma Supreme Court has never been asked to rule upon the precise issue of whether a private lessee of a public trust is entitled to a tax exemption for the leasehold interest. While there is a prior Attorney General's Opinion, No. 69-156, addressing the subject in the context of Art. X, § 6A(f), we do not find the opinion a correct recital of Oklahoma law and, for reasons hereafter discussed, withdraw it.

Opinion No. 69-156 focused on the nature of the leasehold interest. The Opinion concludes, relying on a West Virginia case State v. Bare, 60 W.Va. 483, 56 S.E. 390 (1906), that the leasehold is "intangible property" and thus within the Art. X, §6A(f) exemption.³

* * *

When the public trust leases governmentally owned property, the unitary ownership fragments, leaving only the reversion to qualify for the ad valorem tax exemption. The vast majority of jurisdictions have held, when presented with the question of taxability of property interests divided between public owners and private owners, that the interest of the private owner is not exempt from taxation.

* * *

The actual meaning of the word "owned" in the phrase "property owned by a county" was considered in the case of Mitchell Aero, Inc. v. City of Milwaukee, 168 N.W. 2d

³ This conclusion is inconsistent with virtually the entire body of property law developed at the common law, the vast majority of case authority from other jurisdictions, and the decisions of the Oklahoma Supreme Court. . . .

183 (Wisc. 1969). The property in dispute consisted of two hangers constructed by Aero on land owned by the county. The case, which traced the judicial evolution of ownership in Wisconsin from adherence to bare legal-title language to an emphasis on beneficial ownership as the proper interpretation of the phrase for tax exemption purposes, concluded that for a municipality to qualify for exemption under the statute, there had to be real or true ownership, not paper title only. . . .

* * *

Moreover, the Oklahoma Supreme Court, when called upon to address the tax exempt status of governmental entities, has consistently held to an ownership test. . . .

* * *

The following general principles may be summarized. Only the property actually owned by the public trust or its governmental beneficiary or such rights therein as have not been conveyed away are exempt from taxation. *All interests in the property whether real or personal held by any entity not entitled to an exemption in its own right are subject to taxation.* A leasehold estate is an interest in property which, if held by one not separately and independently entitled to a tax exemption, is taxable for all purposes including ad valorem taxes.

* * *

It is, therefore, the opinion of the Attorney General that private lessees of public trust property, whether real or personal, have a separate, identifiable property interest which is not by reason of any retained trust or governmental beneficial ownership exempt from taxation under either § 6 or § 6A(f) of Article X of the Constitution of the State of Oklahoma, and that each lessee's entitlement to an exemption from taxation for any other reason cognizable under the Constitution, including charitable use, is to be determined as a matter of fact on a case by case basis by reference to the nature of the lessee's use of the prop-

[APPENDIX]

erty. Attorney General's Opinion No. 69-156 is withdrawn.
(All emphasis added)

Sincerely,

(s) *Jan Eric Cartwright*
Attorney General of Oklahoma

(s) *John F. Percival*
Assistant Attorney General

JFP:pc

[Approved in Conference]
